Supreme Court, U. S.
FILED
JUN 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1701

* * *

DR. DON M. SMART,

Petitioner

V.

TEXAS POWER & LIGHT COMPANY, GOVERNOR DOLPH BRISCOE AND ATTORNEY GENERAL JOHN L. HILL,

Respondents

* * *

REPLY OF RESPONDENTS DOLPH BRISCOE, GOVERNOR OF TEXAS, AND JOHN L. HILL, ATTORNEY GENERAL OF TEXAS, TO THE PETITION FOR WRIT OF CERTIORARI

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* * *

QUESTION PRESENTED

Respondents respectfully suggest that the only question presented by the Petitioner's Writ of Certiorari is whether the Court of Appeals correctly affirmed the District Court's dismissal of the Petitioner's cause of action to void the taking of his property through an eminent domain proceeding presently pending in State Court because the Petitioner had previously consented to such taking by accepting the money awarded him at the initial hearing in the State proceeding.

STATEMENT OF THE CASE

Dolph Briscoe, Governor of the State of Texas, and John L. Hill, Attorney General of the State of Texas, are

Respondents in this cause. The predecessors in their respective offices were original Defendants in the United States District Court action filed by the Petitioner. The Respondent State officials were substituted as Defendants after assuming office. Neither Respondent nor his predecessor in office were parties to or had any interest in the eminent domain proceeding filed by Respondent Texas Power & Light Company to acquire an electric transmission line across property belonging to the Petitioner. The interest of the Respondents in this cause arises from their constitutional duty and obligation to preserve, protect and defend the laws and statutes of the State of Texas.

The Petitioner seeks to challenge the constitutionality of articles 3264-3271 of the Texas Civil Statutes, which contain the general procedural law governing the exercise of the power of eminent domain in the State of Texas, despite the recent decision upholding the constitutionality of that body of statutes in *Joiner v. City of Dallas*, 380 F. Supp. 754, *aff'd*, 419 U.S. 1042 (1974).

The Respondent State officials accept as correct the factual statements in the second paragraph of Petitioner's Statement of the Case. The Petitioner's statement of the holding in *State v. Jackson*, 388 S.W.2d 924 (Tex. 1965), however, is neither complete nor accurate. The statement of the Petitioner that a landowner is not compensated at the time he is dispossessed of his property by a taking pursuant to the eminent domain statutes of Texas is wholly fallacious and in direct conflict with the applicable provisions in the Texas Constitution.

ARGUMENT AND AUTHORITIES FOR DENYING PETITIONER'S WRIT OF CERTIORARI

The dismissal of Petitioner's cause of action by the

District Court was correct for several reasons. First, Petitioner's argument based on *State v. Jackson, supra,* is without any reasonable foundation. The doctrine of laches and the Petitioner's withdrawal of the monetary award tendered by Respondent Texas Power & Light precludes him from presenting the issues he sets forth in this Petition. Secondly, Petitioner's due process claim as to interest payable on the monetary award at issue here is unsupportable. Finally, Petitioner's arguments attacking the constitutional vitality of the statutes under which the condemnation occurred are without support in either the decisions of this Court or of State Courts. Each of these responses to the Petitioner's arguments will be explored below.

I.

The Petitioner distorts the holding in *Jackson.* Contrary to his argument, the rule of law in *Jackson,* upon which the District Court based its Order dismissing the Petitioner's action, is separate and distinct from the issue concerning the amount of compensation recoverable by a property owner in an eminent domain proceeding. *Jackson* holds that a property owner's withdrawal of the money awarded him at the initial hearing in an eminent domain proceeding manifests the owner's consent to the taking of his property. On the matter of compensation, *Jackson* states unequivocally that the property owner offered no evidence at the trial as to the monetary value of the property taken from him, thus no value evidence by the property owner was presented for the condemning authority to refute. It is difficult to conceive that such an active litigant as the Petitioner would stand mute on the issue of value at the trial of the eminent domain case involving his property. The holding in *Jackson* concerning consent to the taking by the property owner

conforms with previous holdings of Texas Courts. *See Thomas v. Housing Authority of City of Dallas*, 153 Tex. 137, 264 S.W.2d 93 (Tex. 1953).

The refusal of a property owner to accept the monetary tender made by the condemning authority places the authority on notice that its right to take the property may be challenged. Conversely, should a property owner be permitted to maintain an attack upon the validity of the eminent domain taking after he has accepted such monetary tender, the entire project from which the need for the taking arises would be jeopardized unless the condemning authority litigates to finality the issue of the right to take the property. In this case, the transmission lines of the Respondent Power Company had been erected and were already in operation across the property condemned before the Petitioner instituted his Federal Court action seeking to overturn the taking.

If Petitioner had been genuinely interested in obtaining a judicial determination of the right of the Respondent Texas Power & Light Company to place a transmission line across his property, the Petitioner could have done so months before he accepted the money awarded him in the State eminent domain proceeding by electing to present the issue of the right to take to the State Court. Then and there he could have contested not only that issue, but also the amount of compensation to which he was entitled as a result of that acquisition. Instead, he withdrew the money awarded at the initial stage of the State eminent domain proceeding and nearly two years thereafter attacked the State proceeding in Federal Court.

II.

Petitioner presents the argument that the eminent domain statutes of Texas are invalid because they fail to

require the condemning authority to pay interest to a property owner from the day it takes his property. The date of taking in an eminent domain proceeding is established by the date the condemning authority makes available to the property owner the amount of money awarded at the initial hearing stage of the condemnation proceeding. *City of Fort Worth v. Corbin*, 504 S.W.2d 828 (Tex. 1974). This procedure is in accordance with section 17 of article 1 of the Texas Constitution, which provides:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; . . ."

In this case, not only was the award made available, but Petitioner withdrew it. Whether he reinvested the money in securities or other property or made some other use of it is unknown. Petitioner's argument concerning the amount of interest he should have received on the money he accepted from the Respondent Power Company fails to take into consideration, nor does Petitioner account for, income generated to Petitioner by the award from the time he received it in 1970 until the present.

III.

Petitioner also argues that the eminent domain proceeding is void because his brother, Dr. Scott Smart, was not made a party to the proceeding by the Respondent Power Company. The interest of Dr. Scott Smart was considered in *Smart v. Texas Power & Light Co.*, 525 F.2d 1211 (5th Cir. 1976). Dr. Scott Smart did not record instruments establishing his interest in the

property until two and one-half years after the eminent domain proceeding was filed. This disclosure of Dr. Scott Smart's interest also occurred after the Petitioner accepted the money awarded him at the initial hearing in the proceeding. Furthermore, Dr. Scott Smart acquired his interest in the property from the title held by the Petitioner. It was Dr. Scott Smart's decision alone to delay the disclosure of his interest in the property. The suggestion that the belated disclosure is justification for voiding the eminent domain proceeding defies reason.

The defects that the Petitioner alleges occurred in the proceeding before he accepted the money award, assuming *arguendo*, that those defects were sufficient to invalidate the proceeding, became moot by this subsequent manifestation of the Petitioner's consent to the taking.

Neither does the decision in *Burch v. City of San Antonio*, 518 S.W.2d 540 (Tex. 1975) render the proceeding void. In *Burch*, the property owner sought to enjoin a condemnation proceeding instituted by an entity allegedly not authorized to exercise the power of eminent domain. The opinion discusses the limitations placed by the Texas Legislature upon the use of the power of eminent domain by Home Rule Cities and, in particular, the authority of the City Council of San Antonio to delegate the power of eminent domain to a Board of Trustees of its Water Works. The eminent domain proceeding challenged by the Petitioner was instituted by the Respondent Texas Power & Light Company, pursuant to the authority of article 1436 of the Texas Civil Statutes, which authorizes electric utility companies to bring such proceedings. *Burch*, therefore, has no application in this case.

Petitioner's contention that a taking under the Texas statutes governing the exercise of the power of eminent domain is unconstitutional because it does not

provide for a hearing on the right to take the property at a meaningful time before the property is taken is in direct conflict with the decision in *Joiner v. City of Dallas, supra.*

Commencing with *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); continuing with *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971); *Lynch v. Household Finance Corp.*,405 U.S. 538 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), this Court has determined the constitutionality of the taking of one's property by examining the sufficiency of the notice to the owner before the taking and the opportunity for a hearing afforded him before his property was taken. In each case, the nature of the property right sought to be taken and the statutory authorization for its taking were examined. Although these cases yield no fail-safe formula establishing the requirements for procedural due process, they do make it apparent that the important concern is whether the "taking" is of sufficient stature to justify postponing resolution of the "right to take" issue until after the taking has been initiated. None of these reasons countenance the lack of an adjudication of the right to take. It is elementary that procedural due process requirements are neither technical nor formal. *Mitchell* recognizes that a taking of property can involve the interests of someone other than the person in possession, and that such interests are also entitled to consideration in making an assessment of the constitutional propriety of a taking.

It cannot seriously be contended that the Respondent Texas Power & Light Company, needing possession of an easement over the Petitioner's property in the furtherance of a project to fulfill its commitment to supply electricity to its customers, has no interest in that property worthy of consideration. Such a

proposition would completely disregard the extensive public ramifications attached to the transmission of electrical energy. Neither *Goldberg* nor any of the other cases cited by the Petitioner involved the acquisition of a person's property for public use. Their areas of concern were with redress between the individuals or the retention of individual benefits. In such situations, unlike eminent domain, compensation for the "taking" is not contemplated.

The Petitioner's argument is founded on the implicit premise that the power to take a person's property for public use without his consent is on the same level as statutory remedies, such as garnishment, or such important but wholly individual concerns as retention of a driver's license or welfare benefits. It disregards the guarantee afforded by section 17 of article 1 of the Texas Constitution, that the taking of a person's property without consent for the public use is not complete until the compensation due that person is "first made or secured by a deposit of money". Article 3268 of the Texas Civil Statutes implements this Constitutional requirement. It provides that the amount awarded to the property owner by the Special Commissioners at the initial hearing stage of an eminent domain proceeding must be made available to him before the condemning authority is permitted to take possession of his property. In this case, the Petitioner was afforded a hearing before a commission of three disinterested persons who established the amount of the constitutionally required monetary deposit he subsequently accepted.

It is obvious in this case that the Petitioner and the Respondent Power Company were unable to agree on what sum of money contituted "just compensation". The Petitioner has never denied that he had actual notice of the proposed "taking" prior to the filing of the Petition

for Condemnation by the Respondent Texas Power & Light Company. Thus, even prior to the filing of the eminent domain proceeding, the Petitioner knew of the proposed acquisition and could have engaged the judicial machinery of the State to test the authority being relied upon by the Respondent Power Company to invoke the power of eminent domain by seeking injunctive relief. If such litigation had been brought, the burden would have been on the Respondent Texas Power & Light Company to present evidence supporting its right to take the Petitioner's property. *Lone Star Gas Co. v. City of Fort Worth*, 128 Tex. 392, 98 S.W.2d 799 (1936); *Brazos River Conservation and R. Dist. v. Costello*, 135 Tex. 307, 143 S.W.2d 577 (1940); and *Tonahill v. Gulf States Utilities Company*, 446 S.W.2d 301 (Tex. 1969). The Petitioner's argument concerning the need for a hearing at a meaningful time in order to adjudicate the right to take is, therefore, without substance or merit.

Gibson v. Berryhill, 411 U.S. 564 (1973) does not support his corollary contention that due process requires that the issue of whether the Respondent Texas Power & Light Company properly exercised its power of eminent domain be reviewed by a disinterested person or body. If the Petitioner had raised such an issue at the proper time, it would have been adjudicated by the State Court, not by the Respondent Power Company or by a board composed of representatives of the electric utility industry.

CONCLUSION

The fundamental principles of the doctrine of eminent domain have long been firmly established and have been consistently followed in a host of decisions by this Court. A constitutional attack on the particulars of the Texas scheme of eminent domain was recently

before this Court and was rejected. *Joiner v. City of Dallas, supra.* Thus, no novel questions of law are raised in this cause. No conflict of decisions exists with regard to those issues presented by Petitioner. The correctness of the decision below is clear. There being no reason to warrant review of this case by this Court, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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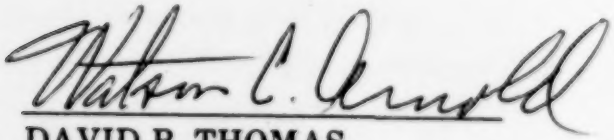

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CERTIFICATE OF SERVICE

I, Dudley Fowler, a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of June, 1976, I have served three (3) copies of the foregoing Reply of Respondents Dolph Briscoe, Governor of Texas, and John L. Hill, Attorney General of Texas, to the Petition for Writ of Certiorari of Dr. Don M. Smart by United States Mail, postage paid, on the following counsel at the addresses shown:

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